No. 87-693

In the Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM B. OWEN, PETITIONER

v.

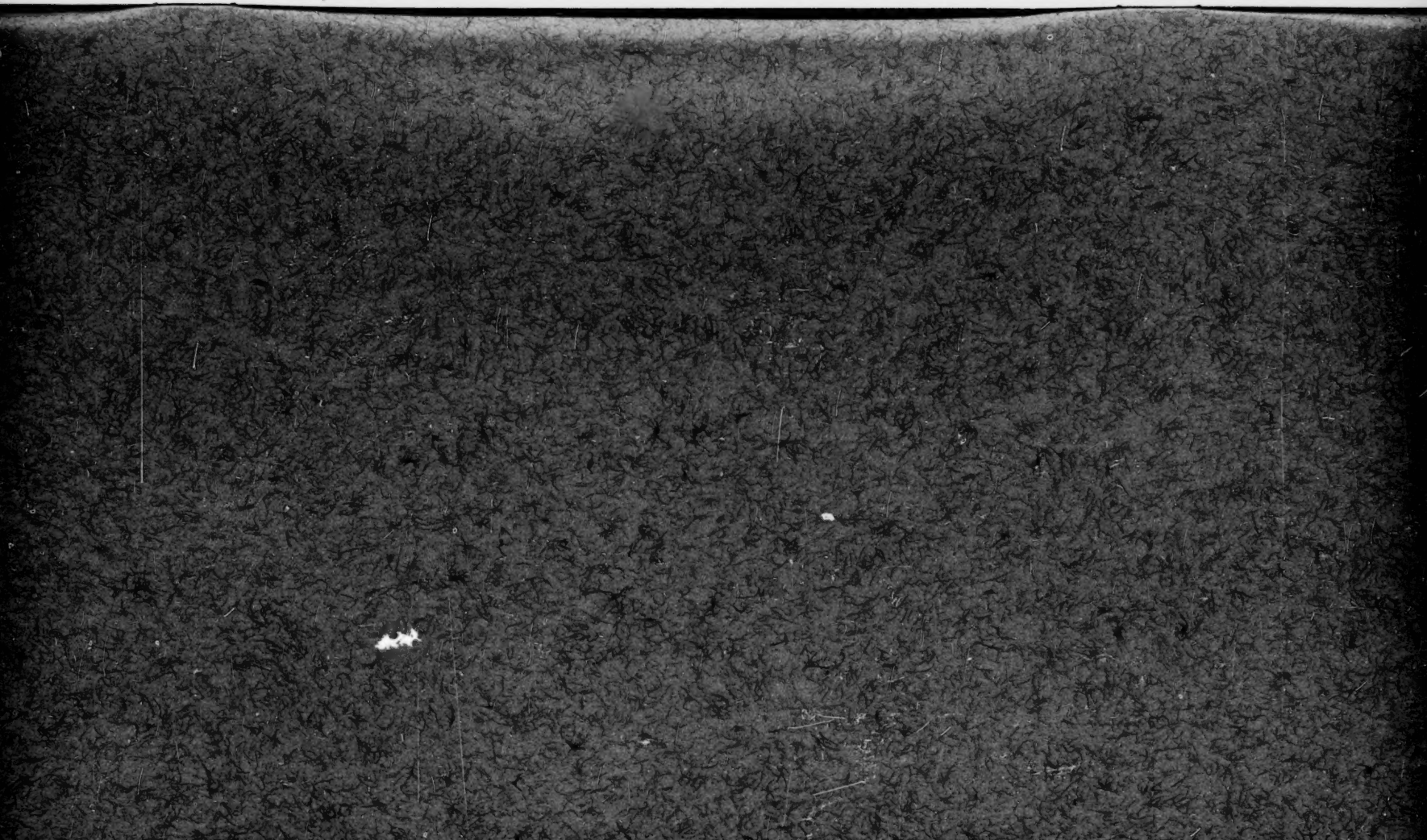
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

NORMAN G. COOPER
Col., JAGC, USA
GARY F. ROBERSON
Lt. Col., JAGC, USA
PATRICK A. HEWITT
Capt., JAGC, USA
PATRICK D. O'HARE
Capt., JAGC, USA
VITO A. CLEMENTI
Capt., JAGC, USA
Appellate Government Counsel
Government Appellate Division
United States Army Legal Services Agency
Falls Church, VA 22041-5013



QUESTIONS PRESENTED

1. Whether the trial judge abused his discretion by declining to order a psychiatric evaluation of the complainant-victim.

2. Whether the trial judge erred by excluding extrinsic evidence of prior accusations of fraternization and verbal sexual harassment made by the victim against third parties in unrelated incidents.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-10a) is reported at 24 M.J. 390. The opinion of the Army Court of Military Review (Pet. App. 11a-12a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on August 31, 1987. The petition for a writ of certiorari was filed on October 29, 1987. The jurisidiction of this Court is invoked under 28 U.S.C. (Supp. III) 1259(3).

STATEMENT

Petitioner, a member of the United States Army, was tried by a general court-martial at Fort Bliss in Texas. He was convicted of indecent assault and forcible sodomy, in violation of Articles 134 and 125, Uniform Code of Military Justice (UCMJ), 10 U.S.C. 934 and 925. He was sentenced to a bad conduct discharge and a reduction in rank to the lowest enlisted grade. The findings and

sentence were approved by the convening authority. The Army Court of Military Review (Pet. App. 11a-12a) and the Court of Military Appeals (Pet. App. 1a-10a) affirmed.

1. Petitioner and the victim, Specialist Molly Petersen, were both stationed at Fort Bliss. On the evening of October 9, 1983, petitioner asked Petersen if she would "go out with him to talk" (Tr. 89). Petitioner met Petersen at her barracks, and they drove to McKelligon Canyon, where they parked. Petitioner then attempted to kiss Petersen. *Ibid.* When she resisted, petitioner ripped open her blouse, hit her on the head, kissed her breast, and held her by the hair while forcing her to perform oral sodomy on him (Tr. 89-90). Petitioner then drove Petersen back to the barracks area, where she jumped out of the vehicle near a traffic light (Tr. 90, 107). Petersen reported the incident to military authorities (Tr. 126-138).[1]

2. a. At trial, petitioner moved for a psychiatric evaluation of Petersen (Tr. 40; AX 11). Petitioner claimed that Petersen had "extensive antisocial and unusual behavior patterns and such individuals are frequently unworthy of belief" (AX 11). Petitioner also alleged that Petersen "is a liar" and that "an objective evaluation of this witness by a competent psychiatrist would prove she is totally unworthy of belief" (*ibid.*). Petitioner conceded that there was no evidence that Petersen was mentally disturbed (Tr. 50). Instead, petitioner relied on two instances in which Petersen had been involved in allegations of fraternization by fellow servicemen,[2] and one instance

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[1] Petersen's account was corroborated by the testimony of several persons who testified that Petersen was in a hysterical state when she returned to the base (Tr. 123-124, 127-128, 133). One person also testified that Petersen's blouse was disheveled and partially open (Tr. 130), which was consistent with her account of the assault (Tr. 89-90).

[2] See *Manual for Courts-Martial, United States – 1984*, Pt. IV, para. 83. Where there is a military custom prohibiting officers from fraternizing with enlisted members on terms of military equality, violation of that custom may constitute an offense under Article 134, UCMJ,

in which Petersen reported that she was harassed outside of the installation post-exchange by an unknown black male (Tr. 40-44).[3] Petitioner alleged that the incidents raised a question about Petersen's credibility (Tr. 46-47). Finding no evidence that Petersen had ever been psychiatrically examined or that she had any history of mental illness, the trial judge denied the defense motion (Tr. 52).[4]

b. Before trial, defense counsel stated that he intended to call as a defense witness Captain Lederle, who was the subject of a fraternization complaint filed on Petersen's behalf. Defense counsel stated that Captain Lederle would deny being with Petersen on the night she said he tried to kiss her (Tr. 59). The prosecutor objected that allowing the captain to testify would lead to a "small trial within a trial" because he would call a witness who saw Captain Lederle and Petersen together on the night in question (Tr. 59-60). The trial judge ruled that he would not permit Captain

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10 U.S.C. 934. See generally *United States* v. *Johanns*, 20 M.J. 155 (C.M.A.), cert. denied, 474 U.S. 850 (1985).

[3] Relying on the representations of government counsel, the trial judge ascertained that: (1) shortly after being assigned to her unit, Petersen told someone else that Sergeant Higgins made a pass at her; (2) Petersen claimed that Captain Lederle once took her on a drive and tried to kiss her (Petersen's roommate filed the fraternization complaint, however, not Petersen (Tr. 40-42)); and (3) Petersen previously filed a report with the military police alleging that she was verbally sexually harassed by an unknown black male outside of the installation post-exchange (*ibid.*). Relying on the prosecutor's representations, the trial judge found that the incident involving Petersen's sergeant was resolved by a counseling session between the two of them (Tr. 51); that the incident with Captain Lederle was administratively investigated as a fraternization complaint and was resolved informally (Tr. 41); and that the last incident was never resolved, because the military was unable to identify the person involved (Tr. 43).

[4] Defense counsel agreed that a psychiatric examination of the complaining witness is "an extraordinary measure" (Tr. 46), and he was unable to cite any authority to support his request that Petersen be psychiatrically examined (Tr. 50).

Lederle to testify, but that he would allow the defense to cross-examine Petersen about the incident (Tr. 60).

c. Petersen testified and was subjected to extensive cross-examination (Tr. 92-121). With respect to the incident involving Captain Lederle, she testified that Captain Lederle invited her to get some ice-cream (Tr. 113), and that Lederle "started making advances towards me and he started talking about how I reminded him of some girl or something like that" (*ibid.*). An investigation was conducted, and Captain Lederle denied being with Petersen that day. No charges were filed against Captain Lederle as a result of the investigation. With respect to the other incident, which involved Sergeant Higgins, Petersen testified that she had never made an allegation of sexual harassment against him (Tr. 99).

Sergeant Higgins testified for the defense about the incident with Petersen (Tr. 152-158). Higgins denied that he had ever made a pass at Petersen, and said that the allegation arose from a misunderstanding during an interview between the two of them (Tr. 157-158). In closing argument, defense counsel attacked Petersen's credibility by referring to the previous incidents involving Captain Lederle and Sergeant Higgins (Tr. 230).

ARGUMENT

1. Petitioner claims (Pet. 4-6) that the Court of Military Appeals improperly ruled that a trial judge lacks the inherent authority to order the victim of a crime to undergo a psychiatric evaluation. That claim is without merit, for two reasons.

First, petitioner has misread the decision below. Although each member of the Court of Military Appeals wrote separately, each judge expressed the view that a trial judge possesses the authority to ensure that a defendant is not denied a fair trial if there is a serious question that a complaining witness may be mentally disturbed. Judge

Cox wrote that a trial judge lacks the inherent authority to compel a witness to submit to a psychiatric examination, but that the judge can exercise considerable "leverage" against the witness and the government—including the authority to dismiss the charges—if that is necessary to guarantee the accused a fair trial (Pet. App. 8a-9a). Judge Sullivan concurred (*id.* at 10a) with Judge Cox insofar as his opinion did not undermine the court's decision in *United States* v. *Zayas,* 24 M.J. 132 (C.M.A. 1987), that a trial judge possesses the inherent authority to order that an exculpatory defense witness be granted use immunity. Chief Judge Everett concurred in the result on the ground that a trial judge has the inherent authority to take the necessary steps to ensure that a defendant receives a fair trial if a witness refuses to submit to a psychiatric examination, but that the trial judge did not err in refusing to order that Petersen be evaluated (Pet. App. 10a). All three members of the court found that the evidence was insufficient to justify the defense request for a psychiatric evaluation of Petersen (*id.* at 9a-10a; *id.* at 10a (Sullivan, J., concurring); *ibid.* (Everett, C.J., concurring in the result)). The Court of Military Appeals thus made it clear that a trial judge should not allow a complaining witness's refusal to undergo a psychiatric examination to deprive a defendant of a fair trial. Any possible difference among the members of that court concerning the means of implementing that right is not presented in this case.

Second, petitioner failed to show that Petersen should have been psychiatrically evaluated. The trial judge found no justification for ordering Petersen examined, the court of military review did not disturb that finding, and the Court of Military Appeals unanimously endorsed it. Further review is unwarranted. See, *e.g., Goodman* v. *Lukens Steel Co.,* No. 85-1626 (June 19, 1987), slip op. 7-8; *United States* v. *Doe,* 465 U.S 605, 613-614 (1984). The trial court's finding is also supported by the record. There was no evidence that Petersen was mentally disturbed or

was ever psychiatrically evaluated, and petitioner conceded that he had no such proof.[5]

Petitioner essentially asks this Court to adopt a per se rule that the prosecutrix in a sex offense who is alleged to be a liar should be psychiatrically examined. No federal court of appeals has adopted that rule; on the contrary, the courts have uniformly held that, given the strong considerations counseling against ordering a witness to undergo a psychiatric evaluation,[6] a trial judge has broad discretion to determine whether to order a witness to be psychiatrically evaluated. *E.g., United States* v. *Tucker,* 773 F.2d 136, 140 (7th Cir. 1985), cert. denied, No. 85-976 (July 7, 1986); *United States* v. *Brown,* 770 F.2d 768, 770 (9th Cir. 1985), cert. denied, 474 U.S. 1067 (1986); *United States* v. *Riley,* 657 F.2d 1377, 1387 (8th Cir. 1981);

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[5] Petitioner's claim (Pet. 5) that Petersen "had a propensity to either make false charges against innocent soldiers or to grossly exaggerate what has transpired between herself and other soldiers" assumes that the fraternization allegations were unfounded, a conclusion shared by none of the three courts below. Defense counsel presented no evidence to support his position that the complaint against Captain Lederle was unfounded. While defense counsel alluded to an investigative report exonerating Captain Lederle, the prosecution disputed defense counsel's representation, and defense counsel did not seek to introduce the report (Tr. 41). Sergeant Higgins explained the complaint against him as a misunderstanding that was quickly resolved (Tr. 157-158). The incident involving the unknown black male was impossible to disprove, since no suspect was ever identified.

[6] There are several countervailing considerations that weigh heavily against ordering such an examination, such as (1) a psychiatric examination may seriously invade a victim's privacy; (2) the trauma of sexual assault is enhanced by the indignity of such an examination; (3) the examination could serve as a vehicle for harassment; and (4) the prospect of being psychiatrically examined may deter victims from reporting sex offenses. *E.g., Government of Virgin Islands* v. *Scuito,* 623 F.2d 869, 875 (3d Cir. 1980); *United States* v. *Benn,* 476 F.2d 1127, 1131 (D.C. Cir. 1972).

Government of Virgin Islands v. *Scuito*, 623 F.2d 869, 874-875 (3d Cir. 1980); *United States* v. *Jackson*, 576 F.2d 46, 48 (5th Cir. 1978); *United States* v. *Benn*, 476 F.2d 1127, 1131 (D.C. Cir. 1972); *United States* v. *Russo*, 442 F.2d 498, 503 (2d Cir. 1971), cert. denied, 404 U.S. 1023 (1972).[7]

2. Petitioner also argues (Pet. 6-9) the trial judge erred by excluding extrinsic evidence concerning the three incidents of alleged sexual harassment. As the Court of Military Appeals noted, however, the relevance of those prior complaints "depended on showing that they were indeed false—a proposition far from established, in our estimation, even through [petitioner's] proffer" (Pet. App. 4a). With respect to the complaint about being harassed by an unidentified male, petitioner conceded at trial that it was impossible to verify or disprove that incident (Tr. 43; Pet. App. 5a); the trial judge therefore did not abuse his discretion by excluding the report Petersen filed about it. Similarly, with respect to the complaint against Captain Lederle, petitioner failed to show that the complaint was false; in response to Captain Lederle's denial, the government was prepared to offer evidence corroborating Petersen's account of the incident. And with respect to the allegation against Sergeant Higgins, the sergeant explained

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[7] None of the federal cases cited by petitioner (Pet. 4) conflicts with the decision of the Court of Military Appeals in this case. See *United States* v. *Riley*, 657 F.2d at 1387 (no abuse of discretion in denial of psychiatric examination where only showing of need was based on defense counsel's affidavit describing the victim as pathological liar); *Government of Virgin Islands* v. *Scuito*, 623 F.2d at 875-876 (no abuse of discretion in denial of examination despite defense allegation that victim was addicted to drugs and sought altered states of consciousness); *United States* v. *Benn*, 476 F.2d at 1131 (no abuse of discretion in trial judge's determination of prosecutrix's competency without the benefit of a psychiatric examination); *United States* v. *Russo*, 442 F.2d at 503 (no abuse of discretion in denial of request for psychiatric examination of chief government witness even though witness had consulted two psychiatrists).

at trial that the matter was the result of a misunderstanding that arose from his treatment of Petersen during a briefing. Petersen never filed a formal complaint about the matter, and the misunderstanding was resolved informally.

In sum, there is no support for petitioner's claim (Pet. 7) that Petersen followed "a pattern of misrepresenting or distorting her encounters with men over a two- to three-month period."[8] The trial judge was therefore correct in refusing to admit extrinsic evidence of the incident involving Captian Lederle under either Mil. R. Evid. 608(b) or (c). While extrinsic evidence is admissible to prove bias under Rule 608(c), Captain Lederle's testimony would not have established that the incident did not occur; it would only have provoked a "trial within a trial" regarding the truth of the allegation against him. For that reason, the Court of Military Appeals was correct in finding (Pet. App. 5a) that Captain Lederle's testimony "would have amounted to a pointless diversion and established nothing."[9]

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[8] Petitioner also suggests (Pet. 7) that Petersen's motive for the charge against him was to seek the assistance of her alleged boyfriend, Specialist Kilgore, who was then leaving the military. Petersen denied any such relationship with Kilgore, however, and petitioner did not present Kilgore to testify at trial.

[9] To the extent that petitioner wanted to make the point that Petersen had previously made complaints about male service members, he was able to make that point—for whatever it was worth—through the testimony of Sergeant Higgins and through his cross-examination of Petersen concerning the Captain Lederle incident. The preclusion of Captain Lederle's testimony did not in any way prevent petitioner from establishing that the complaints were made.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

NORMAN G. COOPER
Col., JAGC, USA

GARY F. ROBERSON
Lt. Col., JAGC, USA

PATRICK A. HEWITT
Capt., JAGC, USA

PATRICK D. O'HARE
Capt., JAGC, USA

VITO A. CLEMENTI
Capt., JAGC, USA
Appellate Government Counsel
Government Appellate Division
United States Army Legal Services Agency

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